United States Court of Appeals

for the Second Circuit

RESPONSES TO PETITION FOR REHEARING

74-1553

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United States Court of Appeals

For the Second Circuit

Docket No. 74-1553

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Petitioners-Appellants respectfully request the Panel for a rehearing and respectfully suggest of this Court a rehearing in Banc on the following grounds:*

1. The Panel has held the United States Carriage of Goods by Sea Act, 1936, 46 USC § 1300 (hereinafter

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* Points 1, 2 and 3 are applicable on the Petition for a rehearing; all seven points are applicable to the suggestion for a Rehearing in Banc.

COGSA) to be applicable *by law* (Footnote 5, p. 543) and by incorporation to one *not a carrier*, namely appellee New York Navigation.

2. Even if New York Navigation be a carrier, it is not a "COGSA Carrier". COGSA does not apply to it by law and, therefore, § 7-309 (2) of the Uniform Commercial Code is applicable, and forbids any limitation where the freight rate is not based on value.

3. The Panel has decided the amount of damages and an issue as to the number of "packages" or units shipped in #2 hold, an issue which was reserved in the Court below and not yet litigated. This issue should be remanded.

4. The Panel has not followed the Supreme Court decisions (admittedly surviving COGSA) that gross negligence and wilful misconduct are valid concepts for judicial determination in deciding a tort-feasor's right to limit his liability.

5. The Panel has "cut-off" a doctrine that a material breach ousts limitation provisions (The Flying Clipper), based upon a moral imperative, in favor of pragmatically allocating risks between sets of insurers. It has not considered the rights of uninsured cargo. The Panel's decision is inapposite to Section 3 (8) of COGSA.

6. The Panel's decision, based on the findings, violates Iligan's Constitutional rights.

7. The consequences of the Panel's decision could be disastrous. It involves an exceptionally important question, is inconsistent with prior decisions of this Court and should be reviewed.

Iligan sues for destruction of its cargo admittedly caused by flooding of hold #2 of the JOHN WEYERHAEUSER where the shipowner-carrier's shoreside officers were found to have known long before the voyage that that hold was

subject to "excessive water entry". The charterer, New York Navigation, was found to have breached an express warranty to provide seaworthy vessels. The owner breached its duty in sending a ship to sea in a known unseaworthy condition. Yet, the Panel has granted both defendants the package limitation of § 4(5) of COGSA.

1. The COGSA applies only to the "carrier". Like the stevedore in *Herd & Co.*, "No statute has limited [New York Navigation's] liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract. . . ." (359 U.S. at p. 827). *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959); *Demsey & Associates, Inc., et al.* v. *SS Sea Star, et al.* (2 Cir. 1972) 461 F. 2d 1009; Cogsa § 1(a) and (b); *Thyssen Steel Corp.* v. *S.S. Adonis*, 364 F. Supp. 1332 (SDNY, 1973).

New York Navigation did not issue the bill of lading (Judge Ward, 372 F. Supp. 859, 870) and had no responsibilities under it (Clause 1(a); App. 14).

New York Navigation's position below was that it was not the carrier*. Judge Ward so found at 372 F. Supp. at 870 and all the facts found by the lower Court were incorporated by the Panel.

The parties agreed in the bill of lading that New York Navigation was not the carrier ("Demise" Clause 1(a); Clause (2) (App. 14). The Panel ignored the phrase therein, "if bound hereby".

Clause 17 of the bill of lading, the so-called package limitation clause, (App. 16) applies only to the "carrier", as defined in the bill of lading.

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* Attached hereto as Exhibit A is page 55 of New York Navigation's trial brief.

Not being the carrier, New York Navigation cannot have the benefits of *Cogsa*, nor of bill of lading Clause 17, either by law or by the Clause Paramount. (Clause 1., App. 13)

To hold Cogsa applicable to New York Navigation is contrary to Judge Friendly's holding in *Nichimen Co.* v. *M/V Farland* (2 Cir. 1972) 462 F. 2d 319, 328 where it is stated:

> "In the unlikely event that Nichimen had done nothing more than enter into the 'Freight Contract' and had received no bill of lading or similar document of title, Cogsa could not have applied here by its very terms . . .—".

New York Navigation issued no bill of lading. The one issued was not the document of title re New York Navigation. Judge Ward and this Panel have so held.

Therefore, New York Navigation is relegated to the agreement of July 11th, which Judge Ward and the Panel have both held was breached and "contains no express provision limiting the liability of the charterer, either as to standard of liability or as to amount" (372 F. Supp. at pp. 869-870).

2. If New York Navigation were a carrier so that § 7-309(2) of the Uniform Commercial Code (New York law) applies, it was not a "*Cogsa* carrier" and *Cogsa* does not apply, by law, to it.*

It does not apply by law because New York Navigation was not the Cogsa carrier, *Sea Star, supra* at p. 1014, and that is because Judge Ward found that:

> ". . . the contract between Iligan and New York Navigation was the Agreement of July 11th, 1966" (372 F. Supp. at p. 870) and

* The agreement with New York Navigation made New York law applicable. The U.C.C. forbids a carrier from limiting its liability unless its freight rates are based upon value.

> "New York Navigation signed the bill of lading as agent for the master, not as carrier" (372 F. Supp. at p. 870)

The Agreement (App. 1) and the bill of lading (App. 13) clearly prove that the freight rates are *not* based on value. This leaves only a question of law.

Iligan, in its trial brief and in a letter to Judge Ward pointed out that New York law governed the July 11th Agreement and referred to the Uniform Commercial Code as applicable but perhaps did not spell out in detail the prohibition in § 7-309(2).

But the Panel is not barred from considering a legal theory not relied on below. It exercises such power with due regard to orderly procedure and fairness to the parties. *North American Leisure Corp.* v. *A & B Duplicators, Ltd.* (2 Cir. 1972) 468 F. 2d 695 (Circuit Judges Feinberg, Mulligan & Moore)

In *Foster* v. *U.S.*, (2 Cir. 1964) 329 F. 2d 717-718, this Court held, through Circuit Judges Kaufman, Lumbard & Marshall:

> "These contentions are wholly different from the points raised in the Court below, but since only a question of law is involved, we will proceed to consider them."

Circuit Judge Feinberg has held that the rule is "not absolute". *Green & Brown* (2 Cir. 1968) 398 F. 2d 1006, 1009.

Where the case is being remanded, as here, the need for judicial economy disappears, and the "new" issue will also be remanded. *North American Leisure Corp.* v. *A & B Duplicators, supra; Empire Life Ins. Co. of America* v. *Valdak Corp.* (5th Cir. 1972) 468 F. 2d 330, 334.

The point involving New York law is a pure question of law. The agreement and the bill of lading establish that New York Navigation's rates were not based on value. (App. 1, 13) It is obvious from the record that the rate was based solely on the weight and measure of the cargo without regard to value.* Under the U.C.C. any limitation is therefore prohibited.

To avoid manifest injustice, Iligan requests this Panel to pass on this point (assuming it is agreed Cogsa does not apply *ex proprio vigore* to New York Navigation) or in the alternative to remand it to Judge Ward along with the other points already remanded.

3. Defendants have the burden of proving that the individual pieces or pallets in hold #2 were "packages" within the meaning of COGSA. Since this issue was reserved and "put over", it has not yet been litigated and there has as yet been no such proof. The Panels finding that there were "188 packages" in hold #2 is not based on the record.

That issue should also be remanded to the District Court, if indeed, remand on this point is necessary.

4. The Panel has held that *Willdomino* (1927) 272 U.S. 718 and *Malcolm Baxter, Jr.* (1928) 277 U.S. 323 and *St. Johns N.F. Shipping Corp.* (1923) 263 U.S. 119 remain valid. Judge Ward and the Panel found that Weyerhaeuser's "... shoreside owners ... did have notice of the problem of excessive water entry ..." into the relevant hold. Yet, for reasons apparently of reducing litigation, it has limited the concept of gross negligence and wilful misconduct (and deviation) to the two types of breaches of

* The $60 per ton was obtained by dividing 2,240 lbs. into 914,567 lbs. which is 408.28 measurement tons and by dividing 40 into 197,620 cubic feet for 4,940.5 cubes. The total was 5348.33 payable tons which made the rate $60. (App. 3)

contract in those cases. It has given the carrier freedom to break its contract with limited liability in all other ways.

The Panel's decision as it relates to New York Navigation is inconsistent with the holding of this Court in *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha* (2 Cir. 1931) 47 F. 2d 878, 879 (Circuit Judge A. Hand) that:

> "The warranty that the goods were on board was broken by the failure to ship them, and that breach under the authorities deprived the carrier of the right to invoke the clauses limiting liability. In The Sarnia, 278 F. 459, where the cargo had been improperly stowed on deck, we held that the valuation clauses in the bill of lading did not serve to limit damages. We said, at page 461 of 278 F.: "The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor." "

This holding is also contrary to the ruling in *The Mormacvega* (2 Cir. 1974) 493 F. 2d 97, 101 that:

> "[6] While the concept of deviation originally applied to unjustifiable changes of route, American courts long have held that any carrier 'misconduct' which amounts to a material breach of the contract of carriage constitutes a 'deviation'."

Knowingly sending a leaking ship to sea increases the risk of loss and is therefore a material breach of contract, *particularly* where the cause is unknown.

It conflicts also with Judge Learned Hand's statement in *Farr* v. *Hain SS Co.*, (2 Cir. 1941) 121 F. 2d 940, 944, that:

"... a deviation is no more than a breach of the contract of carriage".

The holding of Judge Ward and the Panel is that Weyerhaeuser at least *should have known* the clapper valve was leaking. The United States Supreme Court in *Malcom Baxter, Jr.* (1928) 277 U.S. 323, 334 left the question open whether that is sufficient to void the contract and the House of Lords in *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker* (A/B) [1949] A.C. 196 answered that question in the affirmative.

The Panel's negative ruling should be reviewed by this Court in Banc in the interests of international uniformity and in view of the importance of the question.

5. The trend is toward self-insured cargo. The property of such persons has been arbitrarily handed over to Carriers' P & I insurers by the decision of this Panel.

This has been done by "cutting-off" a doctrine (The Flying Clipper*) based upon a moral imperative and bringing in arbitrary insurance classifications. Weyerhaeuser's shore side officers knew hold #2 was leaking and was therefore unseaworthy prior to the loading of Iligan's cargo.

The reason for the *Flying Clipper* doctrine is not solely the loss of cargo's insurance by reason of deviation, it is for the purpose of avoiding the wilful disregard of the safety of cargo by the carriers. Where cargo is usually

* (SDNY 1953) 116 F. Supp. 386, 390. "To uphold the carrier's contention that the limitation of liability is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier with recklessness to violate the terms of the bill of lading, knowing that it cannot be called upon to pay more than $500 per package. Such a policy, if upheld, would immunize the carrier against the consequences of its own wilful actions at the expense of an innocent party."

much more valuable than the ship, it is a mistake to grant limitation for gross negligence or wilful misconduct, such as stowing cargo in a hold known to be leaking.

By adopting Lord Diplock's economic and psychological analysis which was meant for legislators, the Panel has granted to the carrier the benefit of cargo's insurance, which Cogsa forbids the carrier from exacting in its contract. 46 U.S.C.A. § 1303(8).

The Panel's decision calls for "no-fault" for gross negligence or wilful misconduct, which is the province of the Congress not the Courts.*

The amount of the damages in this case has not yet been litigated. If it exceeds the insurance payment, Iligan has an uninsured interest which this decision has arbitrarily granted to the tort-feasor's underwriter.

6. The Panel's application of "in any event" from Cogsa § 4(5) where the shipowner knew hold #2 was leaking violates Iligan's Constitutional rights. There is no public purpose served in granting this type of tort feasor or its insurer a $2,100,000.00 windfall on the facts of this case as found below and by this Panel.

7. Judge Ward and the Panel have held that Weyerhaeuser's shore side officers knew of the "excessive water entry" but did not know the ship was unseaworthy. This is inconsistent and subject to disastrous misinterpretation.

In the age of super ships, the Panel has told shipowners they have little liability for knowingly sending

* This panel also held that "certainty at the expense of legislative policy and equity is undesireable and often turns out to be emphemeral. "*Shinko Boeki Co., Ltd.* v. *SS Pioneer Moon*, et al., Docket No. 74-1853, decided Nov. 29, 1974, not officially reported. Yet this decision seeks just such predictability.

their ships to sea in an unseaworthy condition where the cause of the unseaworthiness is unknown. The danger is apparent. Carriers may now analyze their duty to provide seaworthy ships (with knowledge of a serious problem), not with regard to the value of the cargo but only with regard to $500. per package. This exceptionally important ruling should be reviewed by this Court in Banc. See Exhibit B attached hereto.

WHEREFORE, Petitioners-Appellants respectfully pray that the Court grant the relief sought herein and permit re-argument and the suggested in Banc review.

Respectfully submitted,

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Exhibit "A"—Page 55 of New York Navigation's Trial Brief

". . . vessel to represent it during the voyage (unlike a demise charterer), it is understandable that it should not want to assume responsibility as carrier.

The suit by Iligan against New York Navigation should be dismissed since it was not the carrier.

The bill of lading issued for the Master was a contract with the shipowner, not the charterer. The *Arnold Maersk*, 1924 A.M.C. 672, 673, (SDNY).

But even if New York Navigation, which had nothing to do with the loss, was bound by the bill of lading, then it would have, by reason of clause 1(a), benefit of all the limitations of liability contracted therein, including Sections 4281 to 4286 of the Revised Statutes. The clause provides:

* * *".

Exhibit "B"—"The Journal of Commerce"
December 6, 1974

Regarding Cargo Losses

'MARITIME DEVIATION' DECISION IS ISSUED

By Alan F. Schoedel

Journal of Commerce Staff

A "landmark" decision which will spare ocean carriers from endless litigation in instances where negligence causes loss of cargo has been handed down by the United States Court of Appeals for the Second Circuit.

The unanimous decision of the three-judge court in New York held that the doctrine of "maritime deviation" cannot be extended to acts of gross negligence and willful misconduct by the carrier.

This limits the concept of deviation to the two existing grounds, which are written into U.S. insurance for ocean-transport of cargo. These are "geographical deviation," meaning loss resulting when a ship departs from its announced route, and "on-deck deviation," meaning loss resulting when cargo is carried on deck although the shipper's contract specifies below-deck stowage.

Had the Court of Appeals favored the plaintiffs rather than the shipowner and operator in this new decision, it would have opened the way for literally hundreds and perhaps thousands of cases in which insurance companies would be seeking to have courts find a degree of negligence on the part of the carrier where a mishap resulted in damage to cargo, one legal source explained.

There is still the possibility, even the likelihood, of an appeal to the Supreme Court of the United States. But the

Exhibit "B"

nation's highest court has shown a definite unwillingness in recent years to consider cargo cases of this sort.

The case involves damage to 188 cases of machinery shipped by Iligan Integrated Steel Mills, Inc., aboard the freighter John Weyerhaeuser, owned by the Weyerhaeuser Co. and under charter to New York Navigation Co., Inc. Admittedly, the damage occurred when a corroded valve on a sanitary line permitted seawater to flood into the hold.

Under the U.S. Carriage of Goods by Sea Act, which is taken word for word from an international convention, the shipper was entitled to $94,000 plus interest, based on the ceiling of $500 per case. However, from its insurers Iligan sought and collected $2.2 million, and it was for this much larger amount that the steel company and the insurance companies sued the shipowner and charter.

The claim was that the negligence which allowed the ship to go to sea with the corroded valve was the kind of "deviation"—which would permit abrogation of the contract and loss for the carrier of all the defenses and limitations of liability which are permitted under the Carriage of Goods of Sea Act. The court, however, refused to recognize the position taken by the cargo underwriters. It ruled that the shipowner and charterer are liable to the cargo interests only to the extent of the $500 per package limitation, and that the shipowner, was the party responsible for maintenance of the vessel, must indemnify the charterer for any losses in connection with litigation, including legal fees and expenses.

The significance of the decision, in the view of counsel for the charterer, is not, of course, that it may allow neg-

Exhibit "B"

ligence, but that it removes the question of determining negligence from the arena of the courts in endless litigation.

Judge Henry J. Friendly, who wrote the decision of the unanimous court, said the "difficulties that have been experienced in defining and applying varying degrees of negligence" have already been revealed.

The view of the court was that expressed by a British jurist, that it is much more economical and practical to spread the risk to the cargo among a number of insurers —the insurers which underwrite the cargo of each individual shipper, in other words—that have it concentrated in the insurer of the carrier alone.

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IS HEREBY ADMITTED

THIS 17 DAY OF Dec 1974

[illegible signature]

Attorney(s) for Weyerhaeuser Company

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